

# Court of Appeals, State of Michigan

## ORDER

Rebecca Smotherman v Dov Schuchman

Docket No. 266332

LC No. 04-057929-NH

Helene N. White  
Presiding Judge

Michael J. Talbot

Kirsten Frank Kelly  
Judges

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Because the trial court failed to comply with this Court's earlier order, as explained below, the Court orders that the motion to compel the trial court's compliance is removed from abeyance, and the motion is GRANTED.

On November 7, 2005, plaintiff filed an emergency application seeking leave to appeal the trial court's order striking her expert witness. In lieu of granting the application, this Court issued an order, on November 10, 2005, which, in relevant part, vacated the trial court's order, and remanded the matter to the trial court to consider the factors in *Dean v Tucker*, 182 Mich App 27; 451 NW2d 571 (1990).

On November 28, 2005, plaintiff's counsel filed with this Court a motion to compel the trial court's compliance with the November 10, 2005, order, and also requested clarification as to whether this Court's order had immediate effect. In light of the fact that trial was scheduled to begin on the same day, plaintiff also filed motions for immediate consideration, for a stay of proceedings and to waive the stay requirements of MCR 7.209(A). Although this Court did not retain jurisdiction over the proceedings relating to the consideration of the *Dean* factors, this Court clearly had jurisdiction to accept and rule upon plaintiff's motions, which notably were filed within twenty-one days from the issuance of this Court's November 10, 2005, order. See MCR 7.215(I) and MCR 7.216(A)(7).

Simultaneous with this filing, the parties went on the record in the trial court at 9:30 a.m. to discuss the motions filed with this Court and plaintiff's request for a stay of the trial. Contrary to the suggestion made by the defense attorney at this time, this Court's earlier order was not simply an indication for the trial court "to put some information on the record." Instead, this Court's earlier order vacated the trial court's order because the court failed to conduct an analysis of the *Dean* factors in striking plaintiff's expert witness, a discretionary decision that should be exercised cautiously and with careful consideration by the trial court of a variety of relevant factors. *Id.* at 32-33. Although defense counsel asked the trial court to adopt the brief filed after this Court vacated the trial court's order, which counsel stated outlined the *Dean* factors, the trial court stated it was denying plaintiff's "request" for the reasons stated by defendants. Even if the trial court's statements could be interpreted as an adoption of the brief, such action would have simply amounted to an abdication of the court's discretionary decision, which undoubtedly would not comply with *Dean* or our earlier order. See *id.* at 32-35. Thus, we reject defendants' argument that plaintiff's motions filed in this Court became moot before the trial began.

This Court entered a stay of proceedings on November 28, 2005, pursuant to MCR 7.209(D), and held plaintiff's motion to comply and for clarification in abeyance to allow defendants to

file a response and to allow this Court to rule upon the motion before trial began. Judge Nichols had no authority to continue any proceeding after this Court issued the order, which was faxed to his chambers at 10:00 a.m., on November 28, 2005, after personnel from this Court read the order over the telephone to the personnel at Judge Nichols' chambers. Yet, the transcript of the November 28, 2005, proceedings reflects that Judge Nichols never informed the parties of the stay and continued the voir dire of prospective jurors, and eventually orally dismissed the matter when plaintiff's trial counsel refused to comply with Judge Nichols' demand to continue the proceedings once counsel learned of this Court's stay from his office during the lunch recess.

Accordingly, this matter is REMANDED once again to the trial court for further proceedings consistent with this order. On the Court's own motion, we further direct reassignment of the case to a different judge, in light of the totality of the circumstances and the judge's inappropriate action in continuing the trial despite the stay. See *Feaheny v Caldwell*, 175 Mich App 291, 309-310; 437 NW2d 358 (1989). Although a written order of dismissal has not been provided to this Court, we also declare void any such oral dismissal, and REINSTATE the lawsuit, should the docket entries reflect the matter has been dismissed. A copy this order shall be provided to Oakland County Chief Circuit Judge Wendy Potts.

Finally, this Court issued an order on December 2, 2005, granting the motion for clarification and directing the parties to file additional briefs regarding the trial court's dismissal of the action. The court reporter was further directed to prepare the transcript of the November 28, 2005, proceeding and the parties were directed to bear the cost of the transcript equally. We clarify that this order was not intended to include the intervening plaintiff, Blue Care Network of Michigan, to share in the cost, and the parties are directed to equally pay the outstanding amount owed to the court reporter.

The stay imposed by this Court is lifted, and the Court no longer retains jurisdiction.



A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

JAN 13 2006

Date

*Sandra Schultz Mengel*  
Chief Clerk